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A U.S. 'Official Secrets Act'?

If Leaking Becomes a Crime, Free Debate May Be the Prisoner

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UNLIKE BRITAIN and many other democracies, most of us believe, the United States does not have an "official secrets act" making it a crime for officials to disclose, and newspapers to publish, "national security" information that the government seeks to keep secret.

But the Justice Department has initiated a little-noted prosecution that, if successful, would establish a precedent amounting to a sweeping official secrets act in the United States.

The case involves a government employe, Samuel L. Morison, grandson of historian Samuel Eliot Morison, who has been charged with giving U.S. government photographs of a Soviet aircraft carrier under construction in a Black Sea shipyard to a magazine that printed them. The government has said that it will demonstrate that the photographs relate to national defense because they reveal American intelligence gathering capabilities and targeting priorities.

If the government's view of the statute involved is sustained by the courts and found to be constitutional, then the daily practice of "leaking" to the media, by which the public learns most of what it knows about national security policy, would be drastically curtailed. (The charges against Morison carry a maximum penalty of 40 years in prison and a $40,000 fine.)

In its case against Morison, the government has taken the position that unauthorized retention of a classified document relating to national defense is a violation of the law. Under this reading, anyone — including members of the press — who fit the government's interpretation presumably could be prosecuted. The government asserts that it need not even prove that the person transferring the information intended to harm national security or that the information was given to a foreign government — hostile or friendly.

Despite its potentially momentous consequences, this case has received remarkably little attention. The government has charged that Morison, an employe of the Naval Intelligence Support Command, gave a copy of a classified photograph to Jane's Defence Weekly, published in London by Jane's Publishing Co., widely respected defense analysts.

These facts alone, the government asserts, constitute violations of both the espionage law enacted in 1917 and a separate law relating to theft of government property. (No one at Jane's has been indicted — possibly because its editors are all in England.) Morison's attorneys have argued that the government's prosecution is based on a willful misinterpretation of congressional intent; U.S. District Court Judge Joseph H. Young in Baltimore is expected to rule on the question within the next few weeks.

The government has sought to use the espionage and theft statutes only once before in our history to prosecute someone for transfering national security information to the press. That was the Pentagon Papers case in which Daniel Ellsberg was indicted; the case was dismissed because of pervasive government misconduct, leaving no definitive ruling on the meaning of the statute or its constitutionality.

Apart from the Pentagon Papers case, the government and the press have proceeded until now as if there were no legal prohibitions on the transfer of national security information to the press. The arguments in favor of this view of the law are based on the intent of Congress as documented in the legislative history of the two statutes, on constitutional guarantees of a free press and on a view of sound public policy.

One of the statutes on which the government relies in the Morison case is that portion of the "espionage" laws that does appear to make the unauthorized transfer of national defense information a crime. As drafted, the statute seems to require proof of nothing more than that an unauthorized transfer of classified information occurred. However, that interpretation makes no sense in light of the care that Congress took in drafting the nation's first espionage law in 1917. The debates in both houses are replete with references to the importance of public debate and the need to be sure that the statute would not reach publication of information but only covert transfers to foreign powers.

Moreover, if the government's reading of the statute is correct, why did Congress later enact other statutes making it a crime for government officials to reveal specific categories of classified information such as codes, communications and the identities of covert agents? And why would the Congress have exhaustively debated the safeguards it eventually built into these later statutes to protect the press?

A 1973 article in the Columbia Law Review — widely considered as definitive on the legislative history — concluded that the general espionage laws were not intended by Congress to cover transfer of information for publication.

Moreover, if the statute were given the interpretation the government is urging now, it would violate

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the First Amendment by allowing the government to circumscribe debate on national defense policy simply by throwing a classified screen around pertinent information.

Where the government is seeking to prevent publication of information, the Constitution demands that the government demonstrate that that publication would cause very severe damage and that both the government official and the press were on clear notice of what information may not be published. Otherwise, with both the press and public officials left to operate in a vague area, the chilling effect on national security debate would be very severe. The First Amendment does not tolerate such restrictions on public debate.

The government's efforts to use the theft of government property statutes in this situation are similarly flawed. If Congress had intended the theft statutes to cover transfer of information, it would not have — as it has on a number of occasions — engaged in long debates about whether to make the transfer of specific categories of information a crime and what safeguards to build into the statutes.

Applying the theft statutes to unauthorized disclosure of information would involve even more sweeping restrictions than use of the espionage laws because the theft statutes would not be limited to national security information. Thus the public interest would be best served by the government's abandoning this prosecution, or by the court's rejecting the effort to use these statutes in this manner.

The government does not have to be helpless in the face of publication of information in situations where great harm would result. But it must seek narrowly drawn statutes with careful safeguards, as it has in the past. Such statutes would escape successful constitutional challenge, even if they apply to the press as well as to government officials, if they are precisely drafted and limited to clearly definable categories of information that must be kept secret.

The government has never asked Congress to prohibit unauthorized disclosure of satellite photographs, which are said to be involved in this case. If asked, Congress almost certainly would do so. However, in the absence of such a statute, convicting Morison would give the government a virtually unlimited authority to restrict what we can read about national security matters — an authority that no administration could resist using.

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